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No. 78-659

In the Supreme Court of the United States

OCTOBER TERM, 1978

GERHARD FORSTNER, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
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Washington, D.C. 20530

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Petitioner contends that his guilty plea to a state charge of "illegal furnishing of narcotics" did not subject him to deportation under 8 U.S.C. 1251(a)(11) as an alien who has been convicted of violating a "law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, or * * * any law or regulation governing or controlling the * * * sale, exchange, dispensing, [or] giving away" of those substances.

1. Petitioner, a native and citizen of Austria, entered the United States as a lawful permanent resident on December 11, 1972, as the spouse of a United States citizen (Pet. App. A-5). On December 1, 1975, he pleaded guilty to a charge of "illegal furnishing of narcotics" in violation of Or. Rev. Stat. § 167.207 (1975) (A.R. 120-124).[1] Imposition of sentence was suspended, and peti-

[1] "A.R." refers to the administrative record filed in the court of appeals. Pursuant to a plea bargain, a second charge was dismissed (see Pet. 5-6).

tioner was placed on probation for eighteen months and fined $295 (Pet. App. A-5; A.R. 120-121).

Deportation proceedings were instituted on May 27, 1976, by an order to show cause alleging that petitioner had been convicted of the offense of illegal furnishing of narcotics in violation of state law, and that he was therefore deportable under Section 241(a)(11) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(11) (Pet. App. A-14 to A-16). The immigration judge found petitioner deportable (Pet. App. A-10 to A-12), and the Board of Immigration Appeals affirmed (Pet. App. A-4 to A-9). The court of appeals in turn affirmed the decision of the Board (Pet. App. A-1 to A-3; 579 F. 2d 506).

2. Petitioner contends (Pet. 8-12) that his state conviction for "illegal furnishing of narcotics" is ambiguous, because the state statute covers conduct that is not within the scope of 8 U.S.C. 1251(a)(11). Oregon Revised Statute § 167.202(3) (1975) provides that " '[f]urnishes' means to sell, barter, exchange, give or dispose to another, or to offer or agree to do the same * * *." Petitioner argues that the Oregon statute, unlike Section 1251(a)(1), applies to "barter" and to a mere "offer" to barter. He therefore contends that the proof that he pled guilty to the state offense did not establish his deportability by clear and convincing evidence.

The court of appeals correctly rejected this argument, observing (Pet. App. A-2) that "[n]othing in the legislative history suggests Congress intended to limit the broad scope" of Section 1251(a)(11), which extends to any violation or conspiracy to violate "any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, or * * * any law or regulation governing or controlling the * * * sale, exchange, dispensing, [or] giving away" of those substances. The Oregon offense of furnishing narcotics fits comfortably

within this broad federal definition. See *Bronsztejn* v. *INS*, 526 F. 2d 1290 (2d Cir. 1975) (conviction for attempted possession of marijuana a deportable offense under 8 U.S.C. 1251(a)(11)). Moreover, the record indicates (Pet. App. A-8; A.R. 41) that petitioner's state conviction resulted from the sale of marijuana, not barter or a mere offer to barter.

2. Petitioner next contends (Pet. 13-17) that because his conviction may be expunged pursuant to Or. Rev. Stat. § 137.225 (1975), it is not sufficiently final to provide the basis for deportation.

It is well settled that a conviction has attained the finality necessary to support a deportation order under 8 U.S.C. 1251(a)(11) when the alien has exhausted or waived his right to direct appellate review. *Marino* v. *INS*, 537 F. 2d 686, 691-692 (2d Cir. 1976). Petitioner's conviction is thus final, for the purpose of Section 1251(a)(11), and the possibility of an expungement has no bearing on his present deportability.

Moreover, even if petitioner's conviction is expunged, that would not prevent his deportation. The general rule is that a state expungement of a narcotics or marijuana conviction has no effect on deportability. *Kolios* v. *INS*, 532 F. 2d 786 (1st Cir. 1976), cert. denied, 429 U.S. 884 (1976); *Gonzalez de Lara* v. *United States*, 439 F. 2d 1316 (5th Cir. 1971); *Tsimbidy-Rochu* v. *INS*, 414 F. 2d 797 (9th Cir. 1969); *Matter of A-F-*, 8 I. & N. Dec. 429, 441 (A.G. 1959). There are two limited exceptions to this rule: convictions pursuant to a state counterpart of the Federal Youth Corrections Act (18 U.S.C. 5005, *et seq.*), see *Matter of Berker*, Interim Decision No. 2511 (BIA 1976), and convictions pursuant to a state counterpart of the first offender provisions for simple drug possession under the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 844). See *Rehman* v. *INS*, 544 F. 2d 71 (2d Cir. 1976); *Matter of Werk*, Interim Decision No.

2589 (BIA 1977). Petitioner's conviction does not fall within either of these two limited exceptions, since Or. Rev. Stat. § 167.207 is neither a youthful offender nor a first offender provision. (Nor was petitioner's conviction for simple possession, as required by the second exception.)[2]

4. Petitioner's final contention (Pet. 18-21) is that he was denied due process of law because the immigration judge permitted the INS to amend the order to show cause at the close of the deportation hearing. Petitioner argues that permitting amendment was prejudicial because there was insufficient evidence to support the charge as originally drafted. He also urges that the procedure by which the charge was amended did not satisfy the INS's regulations.

This claim is insubstantial. The order to show cause originally alleged that petitioner was "convicted on December 1, 1975, in the Circuit Court of the State of Oregon for Lane County of 'Illegal Furnishing of Narcotics' " (A.R. 118). The INS offered as proof the order of probation and change of pleas, both of which recited petitioner's guilty plea to the charge of "ILLEGAL FURNISHING OF NARCOTICS," and the indictment, which charged that petitioner "unlawfully and knowingly furnish[ed] the narcotic drug marijuana" and cited Or. Rev. Stat. § 167.207 (A.R. 97, 120-123). Before the hearing concluded, the INS moved to amend the order to show cause to specify that the substance furnished was marijuana (A.R. 109-110). This amendment was not necessary, since the original allegation adequately informed petitioner of the charge he would have to meet, and the evidence sustained the charge. Nevertheless, the

[2]The Board of Immigration Appeals so recognized (Pet. App. A-5 to A-6), adding that "[s]hould [petitioner] succeed in getting his conviction expunged pursuant to Oregon's 'first offender' or 'youthful offender' statutes, he could then move to reopen these proceedings."

immigration judge granted the motion, but continued the hearing for two months to enable petitioner to respond to the amended charge (Pet. App. A-6 to A-7).

This procedure did not violate petitioner's right to due process. Nor did it contravene the Service's regulations, which permit the trial attorney to lodge additional charges "at any time during a hearing." 8 C.F.R. 242.16(d). Although petitioner opposed the amendment on the ground that the Service had already rested, the hearing had not yet been concluded, and the immigration judge ruled that the amendment was proper (A.R. 110-111; compare A.R. 117).[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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[1]Petitioner also suggests (Pet. 20) that the Service failed to abide by the policy that it would not institute deportation proceedings against aliens convicted of possession, importation, or distribution of less than 100 grams of marijuana for no remuneration. See INS Operations Instructions §242.1(a)(28) (1977). However, as we have already noted, petitioner's conviction arose from a sale of marijuana (Pet. App. A-8; A.R. 41).

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